

From: Bob Lewis
To: Microsoft ATR,attorney.general@po.state.ct.us@inet...
Date: 1/25/02 10:34am
Subject: Comments on DoJ vs Microsoft proposed remedy

To whom it may concern,

My name is Bob Lewis. I write the "Survival Guide" column for InfoWorld. Several readers have encouraged me to share the following with you - it's a column I published shortly after Judge Jackson's original verdict proposing an alternative remedy to those already discussed. I've appended the text below; the URL is <http://www.infoworld.com/articles/op/xml/00/04/24/000424oplewis.xml>.

A few additional comments beyond what the column itself describes:

* As I'm sure quite a few other correspondents have already suggested, the negotiated remedy fails a very basic test: It doesn't penalize Microsoft in any significant manner.

* In addition to the Windows APIs described below, I'd also suggest including the MS Office file formats and interfaces in the scope of the remedy. In a sense, opening the Windows APIs is the remedy for actual damages; the MS Office APIs are punitive damages.

* A benefit of this remedy not stated in the article is that it addresses Microsoft's primary complaint about the trial itself and some other proposed remedies: By opening the interfaces to Microsoft's products, this remedy encourages further innovation on Microsoft's part since it can't simply defend its market position by making it too difficult to create competing products.

* A possible alternative to the \$50 million per hidden API penalty described in the article: Start with \$5 million for the first discovered hidden API or feature, and double the penalty for each succeeding one found.

Aside from these small points the article stands on its own. Even if it doesn't alter your thinking, I trust you'll find it amusing.

- Bob Lewis, InfoWorld (RDLewis@ISSurvivor.com)

Headline: Some suggestions for Judge Jackson as he considers what penalty Microsoft should get

"Your honor, we find the defendants incredibly guilty!"

-- Jury foreman, about Zero Mostel and Gene Wilder, in Mel Brooks' film The

Producers

CAN YOU IMAGINE if Lance Ito had been the judge? By the time this column appears, the verdict itself (for the Microsoft trial, of course ... have there been any others?) will be old news. The obligatory snap judgments will all have been printed, so you've read that (a) Judge Thomas Penfield Jackson was right and should throw the book at Microsoft; (b) he may have been right in theory but technology has passed the whole issue by, so the penalty should be light; (c) the whole trial should never have taken place because antitrust laws are bad for bidness.

The fact is, in the eyes of the law, Microsoft did harm and is guilty. The task now is finding a suitable punishment. What strikes me about this subject is the dreary sameness of the proposed solutions. Every one of them involves either breaking up the company, expropriating its intellectual property (read "Windows"), and/or supervising the company closely while telling it to stop being so naughty.

Sadly, not one of these punishments withstands the most basic of ethical tests: The punishment should fit the crime. The worst is breaking up the company, because in the wacky world of Wall Street, a broken-up Microsoft would probably exceed a unified Microsoft in total market capitalization.

The goal of issuing a punishment is not to enrich the guilty.

Here's one punishment that does not enrich the guilty and does fit Microsoft's crime of abusing its Windows monopoly by bundling and dumping other nonmonopoly products with it. What would be a suitable punishment? Prevent dumping, require the bundling of competing products, and break the monopoly.

Resolving the bundling and dumping issue is easy: If Microsoft bundles a product, it must also bundle the three leading competitors and only give away a product after at least one rival company has done so.

Breaking up the monopoly is a more interesting challenge. Here's one way: Require that Microsoft do what it should do -- both publish and respect the OS interface.

In other words, put the Windows API in the public domain -- not Windows itself, just its API. The court would enjoin Microsoft from hiding APIs or changing specifications once published.

This would create near-instant competition of Windows clones. Without any hidden or changing APIs, clone makers would only be limited by their ability to write code that works.

Enforcing this penalty is where the fun would start: The court should establish a bounty, which would be paid by Microsoft to the first person or

company uncovering a hidden or changed API. Make it \$50 million or so per API, and the average delay between infraction and detection would be measured in minutes.

Here's the best part: Internet Explorer is part of the operating system, so its API, along with the API for the rest of Windows -- all versions -- will now be in the public domain. So will the APIs for any other applications Microsoft declares to be integral to the OS. Wham! Microsoft suddenly has a strong incentive to respect the distinction between OS and application.

That's my solution. Even if you don't like it, at least it's different from the same old stuff.

If, on the other hand, you do like it and are pals with Judge Jackson, feel free to mention it to him. Or mention it to a pal of a pal of his. Six degrees of separation should get it there.